

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In
the matter of:

TAIYO CORPORATION
A Georgia Corporation
d/b/a Sheraton Savannah Resort

Debtor

SHERATON SAVANNAH
CORPORATION
SHERATON FRANCHISE
CORPORATION
(formerly Sheraton Inns, Inc.)

Movants

v.

TAIYO CORPORATION

Respondent

Chapter 11 Case

Number 93-41092

MEMORANDUM AND ORDER ON MOTION FOR RELIEF FROM STAY

Sheraton Savannah Corporation ("SSC") and Sheraton Franchise Corporation filed a Motion for Relief from Stay on July 16, 1993, and the Motion came on for hearing on September 22, 1993. At the hearing, SSC tendered into evidence an appraisal of the Savannah Sheraton Resort and County Club (the "Resort") (which included both real

and personal property) and at the same time moved the Court under 11 U.S.C. Section 107 to seal the appraisal so that its contents would not be made available to the public. Taiyo Corporation ("Debtor") did not object to the tender of evidence or the Section 107 motion, and there being no objection by any other party in interest, this Court admitted the appraisal into evidence and, by order dated September 30, 1993, sealed the contents of the appraisal during the time that the Motion was under advisement. No other evidence was submitted by either the Debtor or the moving parties. Having reviewed the evidence and the record in this case, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The following facts are not in dispute.

1) On or about May 1, 1986, S.S.C.C. Associates, Ltd., executed a note in the principal amount of \$9,900,000.00 in favor of SSC (the "Note"). To secure the debt S.S.C.C. Associates, Ltd., executed and delivered to SSC a deed to secure debt describing the Resort.

2) On December 21, 1990, S.S.C.C. Associates, Ltd., conveyed the property to the Debtor, subject to the Deed to Secure Debt held by SSC and the Debtor executed an assumption agreement effectively assuming the Note.

3) On December 21, 1990, Sheraton and the Debtor entered into a license agreement whereby the Debtor accepted a license to operate a Sheraton Inn on the property

in consideration for certain obligations including, but not limited to, the obligation to make certain payments to Sheraton and to undertake and complete an extensive renovation program. The Debtor has defaulted in its payment obligations under the terms of the license agreement and in its obligation to make substantial repairs to the Resort.

4) The Debtor also defaulted in its payment obligations to SSC and as a result of this default, SSC began advertising the property during the month of June for a foreclosure sale on the first Tuesday in July, 1993. On June 25, 1993, the Debtor filed this bankruptcy case.

Furthermore, the evidence reveals that the Resort, which secures the indebtedness to SSC, constitutes the substantial majority of Debtor's assets. Debtor owes SSC an amount in excess of \$11,000,000.00. The only evidence of value introduced at the hearing was the appraisal of the Resort prepared by Hospitality Services, Inc., on December 30, 1992, and updated as of September 2, 1993. That appraisal concluded that the value of the Resort as of January 1, 1993 was \$7,000,000.00 and had declined to \$6,500,000.00 as of September 1, 1993. No evidence was introduced to contradict these figures.

CONCLUSIONS OF LAW

Movant contends that, pursuant to 11 U.S.C. Section 362(d)(2), it is entitled to relief from the automatic stay to pursue its rights under state law against the Resort property. Section 362(d)(2) provides that, with respect to an act against property, a court shall grant relief from the automatic stay if:

1) the debtor does not have an equity interest in such property; and

2) such property is not necessary to an effective reorganization.¹

Both elements must exist before relief may be granted under this provision, and the movant bears the burden of proving that the debtor has no equity interest in the property. Once this burden is sustained, the burden shifts to the debtor to prove that the property is necessary to its effective reorganization. 11 U.S.C. §362(g).

As noted above, Debtor has no equity in the Resort. The principal debt encumbering the property exceeds the appraised value of property by at least \$2,000,000.00. Thus, Movant has clearly carried its burden under the first element of section 362(d)(2).

Under the second element, Debtor actually bears the burden of proving two points. First, it must prove that the property forms an important or integral part of the Debtor's plan of reorganization, and second, Debtor must prove that the planned reorganization is feasible.²

¹ Section 362(d)(2) provides in full:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay (2) with respect to a stay of an act against property under subsection (a) of this section, if-

(A) the debtor does not have an equity interest in such property; and
(B) such property is not necessary to an effective reorganization.

² See e.g., United Savings Assoc. of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 375-76, 108 S.Ct. 626, 632-33, 92 L.Ed.2d 740, 751 (1988) ("Once the movant under section 362(d)(2) establishes that he is an undersecured creditor, it is the burden of the debtor to establish that the collateral at issue is 'necessary to an effective reorganization.' What this requires is not merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization that is in prospect. This means, as many lower courts . . . have properly said, that there must be a 'reasonable possibility of a successful reorganization within a reasonable

No evidence was offered under either of these points. Indeed since the Resort constitutes virtually all of the Debtor's property and since it cannot be sold for an amount sufficient to pay Sheraton in full, there appears to be no circumstance in which general unsecured creditors could benefit from Debtor's further reorganization efforts. I therefore conclude that the burden of showing that the property is necessary to Debtor's effective reorganization has not been sustained.

Finally, although Movant does not raise the issue in its motion, the appraisal tendered by Movant indicating that the property has depreciated in value by \$500,000.00 over an eight month period provides compelling evidence that Movant's interest in the property is not adequately protected.³ Lack of adequate protection is an alternative ground for the granting of relief from stay under 11 U.S.C. Section 362(d)(1). Consequently I hold that SSC is, under either provision of section 362(d), entitled to relief from the automatic stay as requested in its motion.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the automatic stay of 11 U.S.C. Section 362 is modified to the extent necessary to permit Sheraton Savannah Corporation to exercise any

time. . . And while the bankruptcy courts demand less detailed showings during the four months in which the debtor is given the exclusive right to put together a plan . . . , even within that period lack of any realistic prospect of effective reorganization will require § 362(d)(2) relief." (citation and footnote omitted); In re Albany Partners, Ltd., 749 F.2d 670, 673 n.7 (11th Cir. 1984) ("For property to be 'necessary to an effective reorganization' of the debtor . . . the mere fact that the property is indispensable to the debtor's survival is insufficient."); In re Mulberry Crossing, Inc., Ch. 11 Case No. 91-40466, slip op. at 6-8 (Bankr.S.D.Ga. July, 30 1991) (appeal pending).

³ See e.g., In re Sun Valley Ranches, Inc., 823 F.2d 1373, 1376 (9th Cir. 1987) (affirming district court conclusion that debtor had not borne its burden of proof in showing that subject property was not declining in value thereby justifying relief from stay under section 362(d)(1).)

and all remedies it may have under the terms of the deed to secure debt it holds and applicable state law.

FURTHER ORDERED that the contents of the record which were placed under seal by my order dated September 30, 1993, are ORDERED unsealed and filed in the Clerk's Office.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of October, 1993.